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JEAN-CLAUDE DEMOSTHENIDY  
LYNNE DEMOSTHENIDY

UNITED STATES DISTRICT COURT FOR  
THE SOUTHERN DISTRICT OF CALIFORNIA

JEAN-CLAUDE DEMOSTHENIDY, an  
individual doing business as INTERACTIVE  
DESIGN SYSTEMS,

Plaintiff,

vs.

FINLEY ENGINEERING GROUP, INC., a  
Florida corporation; DOES 1 through 10,  
inclusive,

Defendants.

FINLEY ENGINEERING GROUP, INC., a  
Florida corporation,

Counterclaimants,

vs.

JEAN-CLAUDE DEMOSTHENIDY and  
LYNNE DEMOSTHENIDY, individuals  
doing business as INTERACTIVE DESIGN  
SYSTEMS, DOES 1 through 10, inclusive,

Counterdefendants.

Case No. 07cv2050–WQH (BLM)

**PLAINTIFF’S REPLY TO  
COUNTERCLAIM OF DEFENDANT  
FINLEY ENGINEERING GROUP, INC.**

The Hon. William Q. Hayes

**DEMAND FOR JURY TRIAL**

Action Filed: October 29, 2007

**REPLY TO COUNTERCLAIM:**

Plaintiff/Counterdefendants, JEAN-CLAUDE DEMOSTHENIDY and LYNNE DEMOSTHENIDY, individuals doing business as INTERACTIVE DESIGN SYSTEMS (hereinafter collectively referred to as “IDS”) as and for their reply to the Counterclaim of Defendant/Counterclaimant, FINLEY ENGINEERING GROUP, INC. (hereinafter referred to as “Finley”), state as follows:

1. In response to Paragraph 1 of the Counterclaim, IDS admits on information and belief that Finley is a Florida corporation, but is without knowledge or information as to the location of Finley’s principal place of business.

2. In response to Paragraph 2 of the Counterclaim, IDS admits that they are individuals doing business as Interactive Design Systems, having their office and principal place of business at 16885 Via Camp Court, Suite 207, San Diego, California 92127.

3. In response to Paragraph 3 of the Counterclaim, IDS is without knowledge or information to form a belief as to the truth of the allegations contained in said Paragraph and on that basis denies each and every allegation contained therein.

4. In response to Paragraph 4 of the Counterclaim, IDS is without knowledge or information to form a belief as to the truth of the allegations and on that basis denies each and every allegation contained therein.

5. In response to Paragraph 5 of the Counterclaim, IDS admits that the court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C § 1332(a) and 28 U.S.C § 1367(a).

6. In response to Paragraph 6 of the Counterclaim IDS admits that venue is proper in this judicial district under 28 U.S.C. § 1391(a).

7. In response to Paragraph 7 of the Counterclaim IDS incorporates by reference the prior allegations set forth in Paragraphs 1 through 6 of this Reply.

8. In response to Paragraph 8 of the Counterclaim, IDS admits that Finley entered into a contract on or about May 26, 2006 with IDS to purchase a license to use IDS’s MC3D Geometry Control Software (“Software”) and that on or about July 12, 2006, Finley entered

1 into a second contract with IDS for purchase of a second license. IDS also admits that Finley  
2 entered into a third contract with IDS for the purchase of a third license on or about August  
3 1, 2006 for use of the Software by Finley's client, Cebus Rimon Industrialized Construction  
4 Ltd. ("Cebus"). IDS denies any and all remaining allegations in Paragraph 8.

5 9. In response to Paragraph 9 of the Counterclaim, IDS admits that the purchase  
6 price of the MC3D Software was \$2,900 per copy and the one year support and maintenance  
7 agreement was \$600 per year. IDS denies any and all remaining allegations in Paragraph 9.

8 10. In response to Paragraph 10 of the Counterclaim, IDS, on information and  
9 belief, admits that Finley contracted with Cebus to provide engineering services for the  
10 design of segmental bridges for the Ein Hakoreh Interchange Project Highway 431 in Israel.  
11 IDS is without knowledge as to any and all remaining allegations in Paragraph 10, and, on  
12 that basis, all remaining allegations are denied.

13 11. In response to Paragraph 11 of the Counterclaim, IDS denies each and every  
14 allegation set forth therein.

15 12. In response to Paragraph 12 of the Counterclaim, IDS denies each and every  
16 allegation set forth therein.

17 13. In response to Paragraph 13 of the Counterclaim, IDS denies each and every  
18 allegation set forth therein.

19 14. In response to Paragraph 14 of the Counterclaim, IDS denies that IDS breached  
20 the contracts and also denies, on information and belief, that Finley suffered any damages.  
21 All remaining allegations in Paragraph 14 are denied.

22 15. In response to Paragraph 15 of the Counterclaim, IDS incorporates by reference  
23 the prior allegations set forth in Paragraphs 1 through 14 of this Reply.

24 16. In response to Paragraph 16 of the Counterclaim, IDS denies each and every  
25 allegation set forth therein.

26 17. In response to Paragraph 17 of the Counterclaim, IDS denies each and every  
27 allegation stated therein.

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1           18. In response to Paragraph 18 of the Counterclaim, IDS incorporates by reference  
2 the prior allegations set forth in Paragraphs 1 through 17 of this Reply.

3           19. In response to Paragraph 19 of the Counterclaim, IDS admits that Finley has  
4 denied the allegations of the Complaint but denies any and all remaining allegations in  
5 Paragraph 19.

6           20. In response to Paragraph 20 of the Counterclaim, IDS denies each and every  
7 allegation stated therein.

8           21. In response to Paragraph 21 of the Counterclaim, IDS incorporates by reference  
9 the prior allegations set forth in Paragraphs 1 through 20 of this Reply.

10          22. In response to Paragraph 22 of the Counterclaim, IDS denies each and every  
11 allegation stated therein.

12          23. In response to Paragraph 23 of the Counterclaim, IDS incorporates by reference  
13 the prior allegations set forth in Paragraphs 1 through 22 of this Reply.

14          24. In response to Paragraph 24 of the counterclaim, IDS denies each and every  
15 allegation stated therein.

16          25. In response to Paragraph 25 of the counterclaim, IDS denies each and every  
17 allegation stated therein.

18          26. In response to Paragraph 26 of the Counterclaim, IDS denies all allegations of  
19 IDS's alleged negligence and, on information and belief, denies any and all remaining  
20 allegations set forth therein.

21          27. In response to Paragraph 27 of the Counterclaim, IDS incorporates by reference  
22 the prior allegations set forth in Paragraphs 1 through 26 of this Reply.

23          28. In response to Paragraph 28 of the Counterclaim, IDS admits that an actual  
24 controversy exists between Finley and IDS but denies each and every remaining allegation  
25 contained therein.

26          29. In response to Paragraph 29 of the counterclaim, on information and belief, IDS  
27 denies each and every allegation contained in the said Paragraph for declaratory relief and  
28 other remedies.

1 **AFFIRMATIVE DEFENSES**

2 **FIRST AFFIRMATIVE DEFENSE**

3 IDS alleges, by way of affirmative defense, that the statements referred to in IDS's  
4 Complaint on the end user license agreement ("License Agreement") are true and accurate in  
5 all respects. As per the License Agreement, IDS is not liable for any damages whatsoever  
6 and any and all alleged express and implied warranties were excluded by the License  
7 Agreement, course of dealing and/or trade usage.

8 **SECOND AFFIRMATIVE DEFENSE**

9 IDS alleges, by way of affirmative defense, that the License Agreement included a  
10 conspicuous notice under the heading "Warranty", which expressly excluded all express and  
11 implied warranties with regard to the Software and all accompanying materials.

12 **THIRD AFFIRMATIVE DEFENSE**

13 IDS alleges, by way of affirmative defense, that Finley inspected the goods and  
14 purchased the Software twice for their own use and purchased the Software for the third time  
15 for the use of Finley's client Cebus. By installing and using the Software, IDS alleges that  
16 Finley agreed to the terms and conditions of the License Agreement.

17 **FOURTH AFFIRMATIVE DEFENSE**

18 IDS alleges, by way of an affirmative defense, that the Software was licensed to Finley  
19 in an "As Is" condition as per the License Agreement.

20 **FIFTH AFFIRMATIVE DEFENSE**

21 IDS alleges, by way of affirmative defense, that the contract has been fully performed  
22 by it and that Finley's claims are not actionable.

23 **SIXTH AFFIRMATIVE DEFENSE**

24 IDS alleges, by way of affirmative defense, that there was a tender of performance by  
25 IDS and refusal on the part of Finley of the said performance if Finley installed the Software  
26 without acknowledging the License Agreement.

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1 **SEVENTH AFFIRMATIVE DEFENSE**

2 IDS alleges, by way of affirmative defense, that there was a failure of consideration on  
3 the part of Finley for all rightful actions carried out by IDS.

4 **EIGHTH AFFIRMATIVE DEFENSE**

5 IDS alleges, by way of affirmative defense, that the contract was modified by Finley  
6 thereby causing any loss to Finley and Finley's client Cebus.

7 **NINTH AFFIRMATIVE DEFENSE**

8 IDS alleges, by way of affirmative defense, that Finley engaged in conduct and  
9 activities sufficient to constitute waiver of any action alleged in the Counterclaim.

10 **TENTH AFFIRMATIVE DEFENSE**

11 IDS alleges, by way of affirmative defense, that Finley prevented performance of the  
12 parties' contract.

13 **ELEVENTH AFFIRMATIVE DEFENSE**

14 IDS alleges, by way of affirmative defense, that, per the License Agreement, the  
15 contract was rescinded because Finley failed to comply with a material term of the  
16 agreement. IDS further alleges, by way of affirmative defense, that Finley failed to act in  
17 accordance with the contract and Finley's claims for damages and breach of contract are not  
18 actionable.

19 **TWELFTH AFFIRMATIVE DEFENSE**

20 IDS alleges, by way of affirmative defense, that Finley has failed, neglected, and  
21 refused to reasonably mitigate any damages allegedly caused, which bars or diminishes any  
22 recovery by Finley.

23 **THIRTEENTH AFFIRMATIVE DEFENSE**

24 IDS alleges, by way of affirmative defense, that Finley has failed to state facts  
25 sufficient to constitute a cause of action, or any cause of action, as against IDS.

26 **FOURTEENTH AFFIRMATIVE DEFENSE**

27 IDS alleges, by way of affirmative defense, that IDS's actions were legally and  
28 equitably protected by applicable privileges and business justifications.

1 **FIFTEENTH AFFIRMATIVE DEFENSE**

2 IDS alleges, by way of affirmative defense, that the right to relief on behalf of Finley is  
3 barred by the doctrine of unjust enrichment. Finley would be unjustly enriched if allowed to  
4 recover the relief claimed to be due.

5 **SIXTEENTH AFFIRMATIVE DEFENSE**

6 IDS alleges, by way of affirmative defense, that Finley failed to take any steps to rectify  
7 the problem caused to Finley's client Cebus and in turn any alleged damages were solely  
8 caused by Finley's own negligence.

9 **SEVENTEENTH AFFIRMATIVE DEFENSE**

10 IDS alleges, by way of affirmative defense, that the modification and misuse of the  
11 Software by Finley was not predicted by IDS and was unforeseeable.

12 **EIGHTEENTH AFFIRMATIVE DEFENSE**

13 IDS alleges, by way of affirmative defense, that each purported cause of action  
14 contained in Finley's Counterclaim is barred, in whole or in part, because Finley's damages, if  
15 any, were caused by intervening and/or superseding events beyond the control of IDS and  
16 unrelated to IDS's conduct. Any loss, injury, or damage claimed by Finley was proximately  
17 caused by Finley's own acts or omissions and events unrelated to IDS's alleged conduct,  
18 and/or the acts or omissions of persons or entities other than IDS, over which IDS has no  
19 control.

20 **NINETEENTH AFFIRMATIVE DEFENSE**

21 IDS alleges, by way of affirmative defense, that Finley altered the Software, thereby  
22 causing any loss to Finley's client. IDS further alleges that the License Agreement did not  
23 permit Finley to make any alteration or reverse engineer the Software.

24 **TWENTIETH AFFIRMATIVE DEFENSE**

25 IDS alleges, by way of affirmative defense, that negligence on the part of a third party  
26 was a superseding cause and Finley's claims against IDS are not actionable.

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1 **TWENTY-FIRST AFFIRMATIVE DEFENSE**

2 IDS alleges, by way of affirmative defense, that Finley unreasonably delayed in filing  
3 the Counterclaim with all alleged damages, all of which were unduly and severely prejudicial  
4 to IDS, and that Finley's course of action bars Finley from claiming any recovery under the  
5 doctrine of laches.

6 **TWENTY-SECOND AFFIRMATIVE DEFENSE**

7 IDS alleges, by way of affirmative defense, that Finley's claims are barred, in whole or  
8 in part, by the doctrine of estoppel.

9 **TWENTY-THIRD AFFIRMATIVE DEFENSE**

10 IDS alleges, by way of affirmative defense, that Finley was careless and/or negligent  
11 about the matters complained of in the Counterclaim. Said carelessness and/or negligence  
12 proximately contributed to any loss or damage complained of in the Counterclaim. Thus, if  
13 Finley should recover damages, IDS is entitled to have the amount abated, reduced, or  
14 eliminated to the extent that Finley's carelessness and/or negligence caused or contributed to  
15 its loss.

16 **TWENTY-FOURTH AFFIRMATIVE DEFENSE**

17 IDS alleges, by way of affirmative defense, that Finley's claims are barred, in whole or  
18 in part, because Finley proceeded with full knowledge and/or awareness into the transactions  
19 and occurrences that form the bases of its claims as alleged in the Counterclaim.

20 **TWENTY-FIFTH AFFIRMATIVE DEFENSE**

21 IDS alleges, by way of affirmative defense, that Finley, by installing and using the  
22 Software, acknowledged that it had read and understood the contents of the License  
23 Agreement and was bound by the terms and conditions therein.

24 **TWENTY-SIXTH AFFIRMATIVE DEFENSE**

25 IDS alleges, by way of affirmative defense, that the License Agreement is the complete  
26 and exclusive statement of the agreement between IDS and Finley and that Finley assumed  
27 responsibility for the selection of the Software to achieve the intended results; the acquisition  
28



1 and integration of other software and hardware compatible with the Software; and the  
2 installation, use, and results obtained from the Software.

3 **TWENTY-SEVENTH AFFIRMATIVE DEFENSE**

4 IDS alleges, by way of affirmative defense, that Finley's claims for equitable relief are  
5 barred to the extent there is an adequate remedy at law.

6 **TWENTY-EIGHTH AFFIRMATIVE DEFENSE**

7 IDS alleges, by way of affirmative defense, that Finley has enjoyed the full benefit of its  
8 purchase of the Software and it is thereby barred from making the claims for relief set forth in  
9 the Counterclaim.

10 **TWENTY-NINTH AFFIRMATIVE DEFENSE**

11 IDS alleges, by way of affirmative defense, that Finley's claims are barred, in whole or in  
12 part, because IDS is not in privity with Finley's client Cebus.

13 **THIRTIETH AFFIRMATIVE DEFENSE**

14 IDS alleges, by way of affirmative defense, that it has insufficient information or  
15 knowledge upon which to form a belief as to whether it may have any unstated affirmative  
16 defenses available and IDS hereby reserves the right to assert additional affirmative defenses in  
17 the event discovery indicates such defenses are appropriate. IDS further reserves the right to  
18 amend this Reply and/or affirmative defenses accordingly and/or to delete affirmative defenses  
19 that it determines are not applicable during the course of subsequent discovery.

20 **PRAYER**

21 WHEREFORE, IDS prays for judgment as follows:

- 22 1. That Finley take nothing from its Counterclaim;  
23 2. That judgment on the Counterclaim, and each cause of action against IDS, be  
24 entered in favor of IDS;  
25 3. For an order determining the parties' rights and obligations under the License  
26 Agreement;  
27 4. That IDS be awarded its costs incurred herein, including reasonable attorneys'  
28 fees; and

1           5.       For such other and further relief as the court may deem just and proper.

2                               **DEMAND FOR JURY TRIAL**

3           Plaintiff and Counterdefendants JEAN-CLAUDE DEMOSTHENIDY and LYNNE  
4 DEMOSTHENIDY, individuals doing business as INTERACTIVE DESIGN SYSTEMS,  
5 request a trial by Jury on all issues so triable.

6  
7                               Respectfully Submitted,

8                               **THE TECH LAW GROUP, P.C.**

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10          Dated: January 11, 2008

By:           /s/ Jonathan A. Paul\*          

11                               Jonathan A. Paul  
12                               Attorneys for Plaintiff and Counterdefendants  
13                               **JEAN-CLAUDE DEMOSTHENIDY and**  
14                               **LYNNE DEMOSTHENIDY**  
15                               110 West C Street, Suite 2200  
16                               San Diego, CA 92101

17                               \*I hereby attest that I have on file all  
18                               holograph signatures for any signatures  
19                               indicated by a "conformed" signature (/s/)  
20                               within this e-filed document.

**CERTIFICATE OF SERVICE**

I hereby certify that on January 11, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notice of such filing to the following:

Karen Anderson Holmes: kholmes@bpplawcorp.com

Todd Craig Samuels: tsamuels@bpplawcorp.com

**THE TECH LAW GROUP, P.C.**

Dated: January 11, 2008

By: /s/ Jonathan A. Paul\*

Jonathan A. Paul

Attorneys for Plaintiff and Counterdefendants

**JEAN-CLAUDE DEMOSTHENIDY and  
LYNNE DEMOSTHENIDY**

110 West C Street, Suite 2200

San Diego, CA 92101

\*I hereby attest that I have on file all  
holograph signatures for any signatures  
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